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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75 - 1347

OVIDIO OMAR URDIALES, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The pertinent facts and the questions presented are fully stated in the Petition for Writ of Certiorari and the Brief of the United States in Opposition thereto and will not be developed further herein.

RULES INVOLVED

Fed.R. Evid. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R.Evid. 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

ARGUMENT

I.

Respondent argues that the standards of admissibility of prior act evidence are now governed by the new Federal Rules of Evidence. The trial which resulted in Petitioner's conviction was conducted prior to the effective date of the Federal Rules of Evidence but Petitioner recognizes that the applicability of the Rules should be considered because they will have a significant impact on future prosecutions.

Rule 404(b), Fed.R.Evid., states that prior criminal acts cannot be admitted to prove that a person is of bad character but "may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identification or absence of mistake or accident." Rule 403 authorizes trial courts to exclude evidence of prior acts even though such evidence may be of probative value when the value of such evidence is outweighed by the danger of undue prejudice to a defendant. These two rules merely codify the long-standing common law standards for admitting prior act evidence. The criterion for admission appears to be in consonance with the third category outlined in the Petition for Writ of Certiorari in that Fed.R.Evid. 404(b) adopts the "categorization" approach of Professor Wigmore

while Fed.R.Evid. 403 contains the "balancing" test advocated by Dean McCormick.

It should be noted, however, that the Rules do not state objective criteria for admissibility of such evidence. Rule 404(b) contains the general rule prohibiting the admission of evidence of extraneous acts and specifies the exceptions to such general rule. One of the exceptions thus stated is that evidence of other crimes may be admissible to establish intent. Respondent apparently takes the position that the adoption of the Rule ipso facto makes evidence of prior acts admissible for the purpose of establishing intent. In so doing, Respondent has misconstrued the purpose of the Rule. If the general exclusionary rule prohibits the admission of prior act evidence and permits the introduction of such evidence only as an exception to the general rule, it must be apparent that the particular exception under which such evidence is to be admitted must be a material disputed issue during the trial. If there is no dispute over an exception such as intent, then there can be no logical basis for the exception.

Respondent has failed to set forth any reason justifying the admission of evidence concerning prior acts in a case where the intent of the defendant was never made a material disputed issue during the trial. Under such circumstances, the general exclusionary rule outlined in Fed.R.Evid. 404(b) would be applicable rather than the exceptions contained therein and the balancing test outlined in Fed.R.Evid. 404(b) would never become applicable.

Respondent contends that the admission of evidence of prior misconduct was harmless error because the evidence against Petitioner, although circumstantial, was cumulatively powerful. This position is untenable. The evidence against

Petitioner was entirely circumstantial and was as equally consistent with innocence as with guilt. There is no evidence in the record to indicate that the contraband was ever in Petitioner's possession or that he participated in any of the narcotics transactions. A co-defendant, Billy Frank Alexander, who was the principal actor in the heroin sales, testified as a witness and completely exonerated Petitioner. The principal evidence against Petitioner was evidence that would place him in the vicinity when the narcotics transactions were consummated. It should be remembered that Petitioner's presence is not surprising in view of the fact that the transactions occurred at or near Petitioner's place of business during normal business hours and that the principal actor was an employee of Petitioner. There was a third co-defendant in this case who was also present during the time the narcotics transactions took place. The government attempted to implicate him through circumstantial evidence that was similar to and substantially as strong as the evidence against Petitioner (R. 89). This defendant, however, was acquitted by the jury. It is respectfully submitted that in the absence of evidence concerning the prior narcotics transaction, the jury would have placed an innocent construction upon the circumstances relied upon by the government to implicate Petitioner and would have returned a verdict of not guilty.

Respondent argues that the Sixth Circuit would have decided *United States v. Ring*, 513 F.2d 1001, differently had the government not introduced the prior act evidence in the government's case in chief. This distinction is difficult to understand. If prior act evidence is admissible, it is admissible during any stage of the proceeding. Obviously such evidence would most often be introduced in the nature of rebuttal evidence because in most cases a defendant himself injects the question of innocent intent into the case as a

defensive matter. In such cases the defendant makes his criminal intent an issue and the government can properly introduce evidence concerning prior acts as rebuttal testimony. Admissibility is governed not by the stage of the proceeding but by whether or not the intent or state of mind of the defendant has been made a disputed issue.

Respondent further argues that evidence of the prior criminal act was admissible for the purpose of impeaching Petitioner's credibility. In Note 4 on Page 7 of the Brief in Opposition, there is a rather serious, although apparently inadvertent, misstatement of the record. Respondent contends that Petitioner testified he had never discussed narcotics with anyone, thereby casting doubt upon his truthfulness. Petitioner was asked by his trial counsel whether he had, on April 26, 1974, discussed narcotics with Billy Frank Alexander, one of the co-defendants. Petitioner answered, "I never talked narcotics to anybody." Respondent attempts to transform this answer into a statement that Petitioner had never at any time had a discussion regarding narcotics. The pertinent questions and answers are set forth on page 321 of the Deferred Appendix and are as follows:

> Q. Okay. So that day, did you ever talk about narcotics with Billy?
>
> A. I never talked narcotics to anybody.
>
> Q. On that day did you talk about narcotics with Billy on that day?
>
> A. No.

A review of the testimony will show that Petitioner Ur-

diales is a man of Mexican-American descent whose principal language is Spanish. In fact, Petitioner's trial counsel found it necessary to have an interpreter available to assist him in his direct examination of Petitioner (R. 310-311). Petitioner, while not fluent in the English language, attempted to fully and clearly answer each and every question put to him and it is unfair for Respondent to take Petitioner's words out of context.

The natural result of the position adopted by Respondent and the Court of Appeals will be to cause a defendant to be faced with a complete recitation of his misdeeds or alleged misdeeds in every case where he elects to exercise his Constitutional right to deny his guilt and to adopt such reasoning is to promulgate a new and radical rule. The Court of Appeals stated in effect that any time a defendant takes the witness stand, admits his presence at the scene of a criminal transaction but denies his involvement, his denial of involvement carries with it a denial of "intent to be involved" and thereby opens the door to evidence of prior acts for the purpose of establishing his intent.

The Court of Appeals specifically declined to determine whether or not a plea of not guilty would put intent sufficiently in issue to support admission of prior act evidence in the government's case in chief (A-3). The court stated that Petitioner had failed to cite any cases in support of his position that a general denial of guilt "removed intent as a material issue to the point where the prior transaction 'intent' exception should not apply" (A-4). Petitioner respectfully submits that this is the specific issue determined in *Fierson vs. United States* (7th Cir., 1969) 419 F.2d 1020, cited by Respondent, wherein the court states:

> When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence . . .

This, furthermore, is the specific holding in *United States vs. Ring*, supra. Neither Respondent nor the Court of Appeals cite any authorities that would support the position that a defendant, by merely entering a plea of not guilty and denying his involvement in the commission of a criminal offense, places his specific criminal intent in issue.

II.

Respondent apparently misunderstands the purpose and effect of the Omnibus Agreement procedure. It is stated on Page 7 of the Brief in Opposition that the government made no commitment not to introduce prior acts to establish knowledge or intent. Respondent argues that Section 5(a) of the Omnibus form, which reads, "The government (will) (will not) rely on prior acts * * * for proof of knowledge or intent," was marked "N/A" in the margin and contends that the "N/A" marking meant that the entire section was not applicable to the agreement between the parties. A review of the Omnibus Agreement in its entirety will clearly show that this position is untenable.

The instructions for completion of the Omnibus Agreement state, "If an item numbered below is not applicable to this *case*, then counsel will note the same in the margin opposite the item number 'N.A.' " (emphasis added). Respondent substitutes the word "agreement" for the word "case" which

cannot be done because the two words obviously have vastly different meanings when considered in their logical context. A review of the agreement will clearly show "N/A" was utilized both by the government and the defendant in those instances wherein a particular matter had no application to this specific case. One such example is contained in Section 8(b) of the agreement in which Petitioner agreed that he would not rely on the defense of insanity. In Section 8(c) Petitioner marked "N/A" to the question, "Defendant (will) (will not) supply the names of his witness, both lay and professional, on the above issue." It is obvious that since Petitioner agreed not to rely on the defense of insanity, then the question of whether or not he would supply the names of witnesses on the question of insanity would be inapplicable because such evidence could have no bearing on the case.

There are only two possible explanations for the government's failing to adhere to the terms of the Omnibus Agreement, neither of which will benefit Respondent. First, the government may have been unaware of the existence of the prior acts at the time the agreement was executed but later discovered such evidence. In this respect it should be noted that the Omnibus Agreement is a pre-trial agreement and was executed on September 26, 1974, while the trial itself did not commence until December 9, 1974. If this were the case, the obvious and proper procedure would have been for the government to advise the defendant and the court that evidence of the prior act had been discovered and to obtain the court's permission to modify the agreement. Under no circumstances could a knowing violation of the agreement be justified by such a set of circumstances.

The second possibility is even more damaging to Respondent's position. This would be a circumstance where the

government was aware of the prior act but agreed not to use such evidence, thereby misleading the defendant and his counsel.

The testimony elicited during the trial tends to support the second possibility. The prosecuting attorney subpoenaed a witness who was familiar with the prior act for the specific purpose of giving testimony concerning that transaction. The prosecutor admitted to the court that this witness was subpoenaed to testify in the event the Petitioner denied his involvement in the prior transaction (R. 380). Petitioner, however, under cross-examination admitted his involvement in the prior act, thereby rendering such testimony unnecessary.

Respondent further seeks to justify the admission of the prior act evidence by stating that the Omnibus Agreement applies only to the government's case in chief. A review of the agreement itself in no way supports this position. Obviously, the agreement cannot cover all rebuttal testimony because the parties do not know what rebuttal testimony will be needed until the opposing side has introduced testimony. Had Petitioner in this case asserted a defense such as entrapment, alibi, lack of knowledge or a similar defense that would have placed his intent in issue, then the testimony of the police officer regarding the prior act would have been proper as rebuttal testimony. Petitioner, however, did not place his intent in issue and evidence concerning the prior act was elicited by the government in its cross-examination of the Petitioner. The prosecutor's comments make it obvious that the government intended from the beginning of the trial to violate the Omnibus Agreement. It was the hope of the prosecution that Petitioner would deny his involvement in the prior act on cross-examination, thereby

making the testimony of the police officer admissible on rebuttal. This cross-examination itself, however, constituted a violation of the Omnibus Agreement.

The Court of Appeals refused to determine whether there had been a violation of the Omnibus Agreement. The Court of Appeals stated that Petitioner's trial counsel had failed to specifically object to the violation at the time of trial, thereby not preserving it as error (A-4). Petitioner challenged this determination and Respondent has agreed not to rely upon this ground, recognizing that the record establishes that Petitioner's counsel did raise the matter in anticipation of the government's use of the prior misconduct evidence.

Pre-trial agreements of the type utilized in this case constitute an extremely valuable tool to assist courts in the administration of criminal justice. It is respectfully urged that this Court should clearly and unequivocably mandate that trial courts must demand strict adherence to such agreements, otherwise their effectiveness will be destroyed.

SUMMARY

This nation's system of criminal jurisprudence is designed to be rehabilitative as well as punitive. Our society has rejected the premise that merely because a person once transgresses the law that he must forever be condemned as a person of depraved and immoral character. To permit the prosecution to recount all of a person's misdeeds or alleged misdeeds when such evidence has no truly probative value violates the foregoing premises and effectively denies such defendant the presumption of innocence.

CONCLUSION

Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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